

Supreme Court, U. S.

FILED

FEB 17 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. **75-1163**

ROSS SHADE, Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

On Appeal From The Supreme Court of
The State of California

JURISDICTIONAL STATEMENT

ROSS SHADE, For Himself,
44 Montgomery St. #2930
San Francisco, California
94104

TABLE OF CONTENTS

Opinions In Courts Below	2
Grounds For Jurisdiction	2
Questions Presented	5
Statement Of Case	5
Federal Question Raised	6
Federal Questions are Substantial	7
Argument	7
Conclusion	11
Appendix	
A - Order Denying Writ of Review	
B - Rehearing Denied	

TABLE OF CITATIONS

American Railway Express Co. v Danniel	
269 U.S. 40	8
Ball v Sharp & Dohme Inc.	
121 N.Y.S. 2d 20	8
Brown v Merlo	
106 Cal Rpter 388, 506 P2d 212	8
Eisenstadt v Baird	
405 U.S. 438	9
Hamilton Employment Service v N.Y. Tel-	
ephone Co 253 NY 468	10
Harrey v Clyde Park Dist	
32 Ill 2d 60	8
James v Strange	
407 U.S. 128	9
Malloy v Fong	
37 Cal 2d 356	8
Muskopf v Corning Hospital Dist.	
55 Cal 2d 211	8
Rinaldi v Yeager	
384 U.S. 128	9
Ross v Pan American Airlines	
299 NY 88	8
Schwanki Inc. v Wisconsin Telephone Co.	
199 Wis 552, 68 ALR 1320	10
Silva v Providence Hospital	
14 Cal 2d 762	8
Southeastern Express Co. v Pastime Amuse-	
ment Co. 299 U.S. 28	8
Tyler v Western Union Telegraph Co.	
60 Ill 421, 14 Am Rep 38	10
United States v Capital Transit Company,	
325 U.S. 357	2
United States v Detroit and Cleveland	
Navigation Co., 326 U.S. 236	2
United States v Pierce Auto Freight Lines,	
327 U.S. 515	2
Weber v Aetna Casualty & Surety Co.	
406 U.S. 164	9
Waters v Pacific Telephone Co.	
21 C 3d 1	4,6

TABLE OF CITATIONS - Continued

Western Union Telegraph Co. v Czizek,	
264 U.S. 281.....	7
Western Union Telegraph Co. v Priester	
276 U.S. 252.....	7
CODES:	
California Public Utilities Code:	
Section 451.....	9
Section 453.....	9
Section 1702	2
Section 1756.....	2
Section 1759.....	4
Section 2106.....	9
United States Code, Title 28:	
Section 1253	2
Section 2101)b)	2
United States Constitution,	
Fourteenth Amendment	5,7
Tenth Amendment	5,7
OTHER:	
8 Am Jur 2d	
Page 707 at #83	8
Restatement of Contracts	
Section 575	11

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

NO.

ROSS SHADE, Appellant

vs.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA

On Appeal From The Supreme Court Of
The State Of California

JURISDICTIONAL STATEMENT

This is an appeal from order denying a writ of review of the Supreme Court of California issued on October 30, 1975 and order denying a rehearing of that court issued on November 25, 1975.

OPINON BELOW

This action was brought under Section 1702 of the Public Utilities Code of the State of California before the Public Utilities Commission of that State. The action was in the form of a complaint by Ross Shade and William H. Faisst against the Pacific Telephone and Telegraph Company and asked the Public Utilities Commission to declare Rule 14 "LIMITATION OF DAMAGES" imposed by that commission to be null and void. From Decision No. 84374 of Public Utilities Commission, Ross Shade appealed to the Supreme Court of the State of California as provided by section 1756 of the Public Utilities Code. The order denying writ of review was entered on October 30, 1975 and rehearing was denied November 25, 1975.

GROUND'S FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States to review the order the California Supreme Court is conferred by Title 28, United States Code, Sections 1253 and 2101)b). The appellant believes the following decisions sustain the Jurisdiction of the Supreme Court to review the case on direct appeal: United States v Capital Transit Company, 325 U.S.357, United States v Detroit and Cleveland Navigation Company, 326 U.S. 236; United States v Pierce Auto Freight Lines 327 U.S.515.

Decision No. 84374 of the Public Utilities Commission was dated the 29th of April 1975. Appellant presented his petition for reconsideration of that decision on May 6, 1975. The Public Utilities Commission of the State of California in Decision No. 84621 denied relief on July 1, 1975. Appellant's Petition for writ of review was timely filed on July 31, 1975. Likewise, the appellant's petition for rehearing before the California Supreme Court was timely filed on November 10, 1975.

Notice of appeal was filed with the California Supreme Court on January 13, 1976. One copy of the notice of appeal was sent by first class mail with postage prepaid, addressed to counsel of record, to the California Public Utilities Commission and to Pacific Telephone and Telegraph Company on that same day.

The appellant has questioned the validity of a rule having the effect as if a statute and the authority of the California Public Utilities Commission to impose said rule that is repugnant to the equal protection of the law secured to the appellant by the Fourteenth Amendment to the Constitution of the United States. That rule to be found as Schedule Cal. P.U.C. No. 36-T, 4th Revised Sheet 56, Rule No. 14, "Limitation of Liability" is as follows:

- (1) The provisions of this rule do not apply to errors and omissions caused by willful misconduct, fraudulent conduct or violations of law.
- (2) In the event an error or omission is caused by the gross negligence of the Utility, the liability of the Utility shall be limited to and in no event exceed the sum of \$10,000.
- (3) Except as provided in Sections (1) and (2) of this rule, the liability of the Utility for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in any of the services or facilities furnished by the Utility (including exchange, toll, private line, supplemental equipment, directory and all other services) shall in no event exceed an amount equal to the pro rata charges to the customer for the period during which the services or facilities are affected by the mistake, omission, interruption, delay, error or defect, provided, however, that where any mistake, omission, interruption, delay, error or defect in any one service or facility affects or diminishes the value of any other service

said liability shall include such diminution, but in no event shall the liability exceed the total amount of the charges to the customer for all services or facilities for the period affected by the mistake, omission, interruption, delay, error or defect.

The Pacific Telephone and Telegraph Company has used Rule 14 "Limitation of Damages" as a shield and has refused to consider payment of damages.

Rule 14 "Limitation of Damages" is unclear in that gross negligence is a difficult and questionable concept of law so that even if the telephone companies may wish to comply with the provisions it is unable to do so and must test each case in the courts before payment of damages of the amount provided.

Hearings before the Public Utilities Commission of the State of California are conducted before an examiner and the Commission did not hear the appellant's case and refused to do so by way of a rehearing. The Public Utilities Code of the State of California deprives jurisdiction to any court except the Supreme Court to review, reverse, correct, or annul any order or decision of the Public Utilities Commission or to interfere with the commission's performance of its official duties. (Public Utilities Code, Section 1759) And the Supreme Court of the State of California upheld Section 1759 of the code on July 9, 1974, while appellant's case was pending before the Commission so that there is no question that the appellant may not raise this same question in any other state court in California. (Waters v Pacific Telephone Co. 21 C 3d 1) Because of the above the appellant has not been heard, other than by an examiner, and can not obtain a hearing on the questions raised by his petition in another state court.

The rule of which the appellant complains, the hearing and the denial of petitions for review have denied the appellant his rights under the

equal protection of the law and due process of law secured to him by the Tenth and Fourteenth Amendment of the U.S. Constitution.

QUESTIONS PRESENTED

The Public Utilities Commission of the State of California has refused to declare invalid its own rule shielding telephone companies from liability for their own acts of negligence. No court other than the Supreme Court of the State of California may reverse, correct or annul a decision of the Public Utilities Commission. The appellant believes that this immunity unfairly discriminates against the appellant and in favor of the telephone companies on a basis wholly unrelated to the objective of the Public Utilities Code.

The Rule 14 "Limitation of Liability" is so unclear as when the telephone companies may pay damages of ten thousand dollars or a lesser amount, that enforcement of that rule unfairly discriminates against the appellant and in favor of the telephone companies.

Hearings before the examiner appointed by the Public Utilities Commission of the State of California without provision for hearings before the Commission and without a hearing before the State Supreme Court, is repugnant to the due process of law as secured by the Tenth Amendment to the Constitution of the United States.

STATEMENT OF CASE

Because of an error made by employees of the Pacific Telephone and Telegraph Company, the appellant's listing in the classified section of the 1972 directory was omitted from the section of the directory reserved for those engaged in the profession of accounting as certified public accountants. As a result of this omission the appellant was damaged by an amount that he believes exceeds the amount allowable by Rule 14 "Limitation of

Liability".

The nature of the error which resulted in the omission of the appellant's listing was of a type that could and should have been prevented and the appellant believes that it was caused by the gross negligence of the telephone company.

FEDERAL QUESTION RAISED

The appellant's complaint against the Pacific Telephone and Telegraph Company stated that the defendant makes a large number of errors each year and because of the limitation of damages of Rule No. 14 they do not use ordinary care. Appellant asked in that complaint that the rule be revoked. In an amended complaint the appellant asked the Commission to increase the amount which might be recovered.

After the hearing before the examiner appointed by the Commission final briefs were submitted, by the appellant on January 10, 1974 and by The Pacific Telephone and Telegraph Company on January 30, 1974. In the appellant's answer to Pacific's brief, filed February 11, 1974, the appellant again argued that the limitation of liability was not reasonable. On July 9, 1974, while the appellant's case was under submission, the Supreme Court of the State of California, in the case of *Waters vs Pacific Telephone Company*,* on appeal from a decision in favor of Waters in the California Court of Appeal, held that no court other than the Supreme Court of California could review, reverse, correct, or annul any order or decision of the Public Utilities Commission. This decision in the Waters case would preclude the appellant's future action in connection with his civil action. For this reason the appellant petitioned the California Public Utilities Commission to consider additional arguments having as their basis the appellant's constitutional rights.

The equal protection of the law and the due

* (*Waters v Pacific Telephone Co.* 21 C3d 1)

process provisions of the Tenth and the Fourteenth Amendments of the Constitution of the United States have been included in all petitions that have been filed subsequent to July 9, 1974.

FEDERAL QUESTIONS ARE SUBSTANTIAL

Modern business enterprise has no alternative to the telephone and depends on the classified section of the telephone directory. Omission from the "yellow pages" can cause substantial damage to the business or professional person. In those few instances where limited liability is provided in contracts, the existence of an alternative is the key. Thus were an individual seeking services of a company that is shielded from liability by statute or regulation, he is in all other cases provided with clear alternatives. In no cases has the shield of limited liability extended to include those cases where gross negligence of the protected party exists.

No public utility has affected the business and professions more than the telephone. Limitation of liability continues to exist in some states and yet that limitation was reasonable only in those early years before it became as essential as it is to the business community of today. The importance of the telephone can be seen by the fact that the American Telephone & Telegraph Company is today one of the largest corporations in the world.

ARGUMENT

The issues involved in this appeal are similar to those raised by *Western Union Telegraph Co. v Cizek*, 264 U.S. 281 and *Western Union Telegraph Co. v Priester*, 276 U.S. 252. However, gross negligence was absent in these cases and the customer had an alternative where, by payment of an additional amount, he could be assured that the message was sent and received correctly. The issues in

this case also find their equivalent in *American Railway Express Co. v Daniel* 269 U.S. 40 and in *Southeastern Express Co. v Pastime Amusement Co.* 299 U.S. 28. In these cases the customer could have obtained protection by paying a higher rate.

The "American Rule" involving persons being transported by airliner has always permitted recovery of damages even when risk was substantial. 8 Am Jur. 2d, page 707 at #85. Where liability has been limited, as under the Warsaw Convention, the customer has an alternative. *Ross v Pan American Airlines*, 299 NY 88. Unlike these cases, the person requesting telephone service can not obtain insurance that would cover the possibility of negligence by the employees of the telephone company.

The question of limited liability has been resolved in favor of the injured party in state courts. In California the Supreme Court held in *Brown v Merlo*, (106 Cal Rptr 388; 506 Pac 2d 212) that the so called "guest statutes" were invalid under the equal protection of law provisions of the California and U.S. Constitutions.

The same question of limited liability was resolved in favor of the injured parties in cases where statute otherwise would have shielded hospitals rendering service for free. *Silva v Providence Hospital*, 14 Cal 2d 762; *Malloy v Fong*, 37 Cal 2d 356.

The California courts have seen fit to end the immunity from liability as it pertained to local governmental agencies. *Muskopf v Corning Hospital Dist.* 55 Cal 2d 211. The Illinois courts reached a similar conclusion in *Harrey v Clyde Park Dist.* 32 Ill 2d 60. Even in cases of voluntary acts such as the giving of blood, a contract which limited the liability of one party was considered invalid. *Ball v Sharp & Dohme Inc.* 121 N.Y.S.2d 20.

Statutes that discriminate against a class of persons on the basis of criteria wholly unrelated to the objective of the statute have been declared by this Court in innumerable cases a few of

which are: *Reed v Reed* 404 U.S. 71; *Eisenstadt v Baird* 405 U.S. 438; *Weber v Aetna Casualty & Surety Co* 406 U.S. 164; *Rinaldi v Yeager* 384 U.S. 305; *James v Strange* 407 U.S. 128. The rule that limits the liability of The Pacific Telephone and Telegraph Company, discriminates against the entire business community that may be damaged by the negligence of that utility. By reason of this immunity, the telephone company has no incentive to use even slight care to prevent errors in their directories and do irrevocable harm to hundreds of persons each year. Persons advertising in the classified section of the telephone directories would not be subjected to substantially higher rates if that utility did not have this immunity as the means exist that would enable the telephone company to prevent errors.

The Rule 14 "Limitation of Liability" has provided telephone company with immunity that is not reasonable from the standpoint that this rule or tariff is uncertain. Section (1) provides that the rule does not apply to errors and omissions caused by willful misconduct, fraudulent conduct or violation of law. Section 451 of the Public Utilities Code provides that "Every public utility shall furnish and maintain such adequate, efficient just and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees and the public." Also, Section 453 provides that "No public utility shall as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage." Also Section 2106 of the Code provides any person or corporation may recover from the utility for all loss, damages, or injury caused by the utility and "An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any

corporation or person." Rule 14, Limitation of Liability, when considered together with the above provisions of the Code, becomes uncertain in-as-much-as, failure of the telephone company to provide a means by which each person is assured of a proper listing would be a violation of Sections 451 or 453. If gross negligence is present there should be no question but that there has been a violation of section 451.

The definition of gross negligence is not clear in the law so that even if the utility wanted to pay compensation to an injured customer up to the limit, it could not comply. Section 2106 of the Code, on one hand gives the injured party the right to recover damages. But Section (2) of Rule 14, denies the appellee these same rights. Section 2106 even provides for exemplary damages but the Commission has denied the appellant the right to obtain even reasonable compensation for his loss of income and provides nothing for the cost of litigation.

Cases involving the liability of telephone companies are in conflict in the various state courts. There is much support for the limitation of liability from cases decided in the years before the classified section of the directory and the telephone service became so essential to the business community. In the absence of an allegation of gross negligence the New York court held that the limitation of liability rule was a reasonable rule. *Hamilton Employment Service v N.Y. Telephone Co.* (1930) 253 N.Y. 468. In Illinois however, the court found that exemption from the consequences of their own gross negligence by contract is against public policy. *Tyler v Western Union Telegraph Co.* 60 Ill 421. In Wisconsin the court allowed the injured party to recover damages. *Wm H. Schwanke Inc. v Wisconsin Telephone Co.*, 199 Wis. 552, 68 ALR 1320.

Circumstances have changed and today public policy demands that limitation of liability be

abolished in cases where the parties have unequal bargaining positions such as the customer dealing with a public utility. Public policy is well documented in cases involving other than the telephone companies and is also set out at section # 575 of the Restatement of Contracts.

CONCLUSION

The appellant believes that the Public Utilities Commission of the State of California and the Supreme Court of that State have failed to recognize, the changes in public policy, changes in the use of the telephone and the substantial authority that exists which require termination of the rule that limits the liability of telephone companies.

Respectfully submitted,

ROSS SHADE

ROSS SHADE

ORDER DENYING WRIT OF REVIEW

S. F. No. 23326

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

SHADE, ETC., Petitioner,

v.

PUBLIC UTILITIES COMMISSION, ETC., ET AL., Respondents;
PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Real Parties in Interest.

Sullivan, J., did not participate.

Petition for writ of review DENIED.

~~SUPREME COURT~~
FILED
OCT 30 1926
G. E. WHEELER, Clerk

Deputy

Wright
Chief Justice

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

NOV 25 1975

I have this day filed Order _____

REHEARING DENIED

In re: *SF* No. *23326*

Shade

PUC ^{vs.}

Respectfully,

G. E. BISHEL
Clerk

S. P. NO. 23326

IN THE SUPREME COURT OF THE STATE
OF CALIFORNIA

ROSS SHADE, for himself,
Complainant,

vs.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
D.W. HOLMES, WILLIAM SYMONS, JR.,
VERNON L. STURGEON, ROBERT BATINOVICH,
LEONARD ROSS, and the members of and
constituting said Public Utilities
Commission,

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY,

Petitioner,

Respondents,

Real Party in Interest.

NO. 23326

SUPREME COURT

FILED

JAN 13 1976

G. E. NISHEL, Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that Ross Shade, the appellant above-named,
here-by appeals to the Supreme Court of the United States from order denying
writ of review, entered on October 30, 1975 with rehearing denied on
November 25, 1975.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

ROSS SHADE

Ross Shade

AFFIDIVIT OF SERVICE

I hereby certify that I have this date served the foregoing jurisdictional statement upon all interested parties in this proceeding as shown below, addressed to each and including three copies, sent by first class mail, postage prepaid.

Signed under penalty of perjury this 14th day of February, 1976 at San Francisco, California.

ROSS SHADE

Ross Shade

RICHARD D GRAVELLE, J. CALVIN SIMPSON and
JOHN S. FICK, 5066 State Building
San Francisco, California 94102
(Attorneys for the Public Utilities
Commission of the State of California)

JAMES A DeBOIS and RICHARD A SIEGFRIED
140 New Montgomery Street
San Francisco, Ca 94105
(Attorneys for the Pacific Telephone
and Telegraph Company)